

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MELINDA K. WIRTH
Claimant

VS.

VIA CHRISTI REGIONAL MEDICAL CTR.
Respondent

AND

LIBERTY MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 270,139

ORDER

Respondent and its insurance carrier request review of the July 19, 2004 Order Nunc Pro Tunc by Special Administrative Law Judge Vincent L. Bogart. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Steven R. Wilson of Wichita, Kansas, appeared for the claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant requested penalties be assessed against respondent for failure to timely pay, after demand, medical mileage expenses incurred to keep appointments with and referrals from the authorized physician. The Special Administrative Law Judge (SALJ),

in the July 19, 2004 Order Nunc Pro Tunc, ordered respondent to pay penalties in the amount of \$25 and post-award attorney fees were also granted in the amount of \$300.

The respondent requests review of whether the ALJ erred in assessing penalties with regard to medical mileage as well as ordering respondent to pay attorney fees. Initially, respondent argues that the ALJ's Order referred to medical bills and did not specify payment of mileage expenses. Accordingly, respondent argues there was no specific order to pay medical mileage and absent such an order nothing was due and owing. Respondent further argues that pursuant to K.S.A. 44-512a, penalties can only be assessed for late payment of medical bills and mileage expenses are not medical bills. As a result respondent concludes that claimant's attorney's fees should be denied because there was no statutory basis for filing the motion for penalties. Consequently, respondent argues the SALJ's Order Nunc Pro Tunc should be reversed.

Claimant argues it is undisputed that the Workers Compensation Act provides for reimbursement for round trip mileage incurred to obtain medical treatment. Because the ALJ's order provided for payment of related medical expenses, claimant contends the round trip mileage expenses to obtain the authorized medical treatment qualify for reimbursement as a medical bill. Accordingly, claimant argues the SALJ's Order Nunc Pro Tunc should be affirmed. And claimant requests additional attorney fees for the time spent preparing for the appeal to the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On January 15, 2004, Administrative Law Judge Jon L. Frobish designated an authorized treating physician and ordered respondent to provide temporary total disability compensation to claimant if he was taken off work by the authorized physician. In addition, the ALJ further ordered "The authorized and related medical expenses in this matter shall be paid as authorized."

The claimant made three trips to the authorized physician and two additional trips for diagnostic testing at the order of the authorized physician. These trips occurred in February through April 2004. On May 3, 2004, claimant sent a demand letter requesting reimbursement for the 244 miles incurred for the trips.

At the penalties hearing held on July 15, 2004, claimant's attorney noted that the mileage expense had not been paid by respondent. Respondent agreed that the mileage

expense had not been paid within 20 days of the demand letter. Nor did respondent contend claimant was not entitled to reimbursement for the round trip mileage.

The SALJ assessed a \$25 penalty for the total due on the medical mileage and further awarded claimant attorney fees of \$300 based upon two hours time.

Respondent requested review and asserts that there was no specific order to pay medical mileage and accordingly there was no past due bill upon which a penalty could be assessed. Respondent further argues that K.S.A. 44-512(a) specifically provides for assessment of penalty for failure to pay medical bills and disability compensation. Respondent argues medical mileage is neither.

The Workers Compensation Act provides that a worker is entitled to receive a civil penalty when compensation is not paid when due. Whether the claimant is entitled to a civil penalty for unpaid medical bills is controlled by K.S.A. 44-512a(a). The statute requires a written demand to be served on the respondent or its insurance carrier when compensation, including medical compensation, which has been awarded, is not paid and is past due. Such demand must specifically identify the disability compensation or medical compensation that is claimed to be unpaid. If payment of such demand is thereafter refused or is not made within 20 days, a civil penalty shall be paid.

But the employer and its insurance carrier can avoid the civil penalty by paying the compensation within 20 days after receiving the written demand. The penalty statute provides, in part:

(a) In the event any compensation, **including medical compensation**, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.¹ (Emphasis added)

¹ K.S.A. 44-512a.

Respondent argues that mileage reimbursement incurred to obtain medical treatment is not a medical bill and K.S.A. 44-512a only provides penalties for late payment of medical bills. This argument overlooks the language of K.S.A. 44-512a which specifically provides penalties may be assessed for late payment of any compensation, including medical compensation.

The inquiry becomes whether mileage incurred to obtain medical treatment can be considered medical compensation.

K.S.A. 44-510h(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and **transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto**, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. (Emphasis added)

The regulation designed to implement the foregoing statutory language provides:

51-9-11. Transportation to obtain medical treatment. (a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.

(b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions: (1) if an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or (2) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment. Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public transportation, and ambulance service, if required by a physician, and for the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.

(c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.

(d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be

determined by a hearing before a workers compensation administrative law judge.
(Emphasis added)

The Board concludes that both the foregoing statute and regulation contemplate that mileage incurred to obtain authorized medical treatment is clearly a medical expense. Therefore, for purposes of the penalty statute such mileage reimbursement should be treated as medical compensation. And as previously noted, K.S.A. 44-512a provides that penalties can be assessed for late payment of medical compensation.

The dispositive issue is whether Judge Frobish's January 15, 2004 Order included mileage reimbursement for travel to obtain authorized medical treatment. K.S.A. 44-512a requires that there must be an award of medical compensation which is not paid and is past due. In this case, Judge Frobish's Order specifically mandated payment of "medical expenses authorized and related" in the case. As previously noted, the medical mileage incurred to obtain medical treatment would constitute "related" medical expenses. The demand letter specifically identified the purpose of the trips as well as the mileage. Such demand met the specificity requirement of the statute and it was admitted payment was not made within 20 days of demand. Moreover, it was further admitted claimant was entitled to reimbursement for the submitted mileage expenses.²

The mileage expense to attend appointments with the authorized treating physician was a related medical expense included in Judge Frobish's January 15, 2004 Order. After specific demand for payment of the mileage expenses was not made within 20 days of demand, the respondent was appropriately assessed a penalty as well as payment of attorney fees. The SALJ's decision is affirmed.

The Board notes that claimant has made a request for an additional \$450 in attorney fees in connection with the appeal. As provided in K.S.A. 44-536(g) and (h) the determination of attorney fees is initially to be addressed by the ALJ. This would include the request for attorney fees in connection with this appeal.

Accordingly, the award of \$25 in penalties and \$300 in attorney fees is affirmed. The action is otherwise remanded to the SALJ for further proceedings, if necessary, relating to the request for additional attorney fees in connection with the appeal.

AWARD

WHEREFORE, it is the finding of the Board that the Order Nunc Pro Tunc of Special Administrative Law Judge Vincent L. Bogart dated July 19, 2004, is affirmed.

² M.H. Trans. at 7.

IT IS SO ORDERED.

Dated this 30th day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director